Supreme Court, U.S.
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NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1998

SYLVIA D. RECKLIESS; KAREN G. MANDELBAUM; LYN C. MANDELBAUM; ELIZABETH M. BAKER; MARY L. LOVE; KIRK BAKER; HEIRS OF F. P. COOPER; HEIRS OF L. L. PRICE; HEIRS OF LILLIAN B. CARTER; HEIRS OF A.M. FURY; HEIRS OF J. A. LEWIS; HEIRS OF H. S. PAYNE; HEIRS OF CHARLES J. OLSON; HEIRS OF A. ABRAHAM; HEIRS OF GEORGE R. HRIVNAK; HEIRS OF L. M. MARKCOM; JAMES B. NICKELL; HEIRS OF HARRY B. OGG; HEIRS OF A. C. MCGILTON; HEIRS OF A. J. KNUTSON; HEIRS OF EDWARD BRODIN: HEIRS OF RICHARD HATCH; HEIRS OF IRA M. HENDERSON; HEIRS OF H. L. FOUTCH; HEIRS OF JOHN C. KNOX; HEIRS OF GEORGE A. CURRY; MARY LOVE, TRUSTEE OF THE LOVE FAMILY TRUST,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

1. Where the evidence clearly indicates the government's intent to exclude oil and gas interests and the condemnation judgment documents expressly state that the United States took land for the creation of the Falcon water storage reservoir in "fee simple title save and except oil and gas", did the title to perpetual oil and gas royalties then vest in the United States as against the record title Royalty Owners?

2. In the alternative, in the event the oil and gas interests mentioned in Question #1, supra, are deemed to have been taken and thus vested in the United States, do these perpetual intangible and unpossessable oil and gas royalty interests (which have only a single property attribute - the yield of profit) have any valid association with the Falcon water storage reservoir so that they are necessary for the public purpose of establishing and operating the reservoir?

3. In the alternative, in the event the oil and gas interests mentioned in Question #1, supra, are deemed to have been taken and thus vested in the United States, in light of the fact that the United States accepts the income from the ownership of such royalty interests, did not the United States act unlawfully and exceed its authority in taking such interests which are shown never to have been required for the project, were never intended to be claimed by the United States according to its announced policy, and thus were for a nonpublic purpose?

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were plaintiff-appellants; Sylvia D. Reckliess; Karen G. Mandelbaum; Lyn C. Mandelbaum; Elizabeth M. Baker; Mary L. Love, Kirk Baker; Heirs of F.P. Cooper; Heirs of L. L. Price; Heirs of Lillian B. Carter; Heirs of A. M. Fury; Heirs of J. A. Lewis; Heirs of H. S. Payne; Heirs of Charles J. Olson; Heirs of A. Abraham; Heirs of George R. Hrivnak; Heirs of L. M. Harkcom; James B. Nickell; Heirs of Harry B. Ogg; Heirs of A. C. McGilton; Heirs of A.J. Knutson; Heirs of Edward Brodin; Heirs of Richard Hatch; Heirs of Ira M. Henderson; Heirs of H. L. Foutch; Heirs of John C. Knox; Heirs of George A. Curry; Mary Love, Trustee of the Love Family Trust, who bring this petition, and defendant-appellee United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reprinted in the appendix hereto. See Appendix (hereafter App.) B at A3. The Per Curiam Order Denying Rehearing is not reported and is reprinted in the appendix hereto. See App. A at A2. The order of the United States District Court Southern District of Texas, Laredo Division (Kazen G.) which is unreported, is reprinted in the appendix hereto. See App. C at A6.

JURISDICTION

The Fifth Circuit Court of Appeals rendered its opinion and judgment on February 23, 1998. A timely filed petition for rehearing was denied on April 16, 1998.

This petition has been filed within ninety days of the

denial of the petition for rehearing and is therefore timely pursuant to 28 U.S.C. §2101(c) (1994) and Sup. Ct. R. 13. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) (1993).

CONSTITUTIONAL PROVISIONS

40 U.S.C. Sec. 258a
U.S. Const. Amend V

STATEMENT OF THE CASE

The Royalty Owners are record title owners of perpetual oil and gas royalties in land situated in Porcions 14-17. Shares 5A, 28A, 23, 20, 21 and 26 of the Mier Jurisdiction of Mexico, which is now Zapata County, Texas. (R.421). Their predecessor-in-title, one H. J. McMullen, in 1927 acquired title to an undivided one-sixteenth mineral fee interest in these lands. (R.419). He carved out of this fractional mineral fee interest and conveyed to the present royalty claimants perpetual royalty interests in the several Share tracts. (R. 418). The United States now claims that it acquired these oil and gas royalties in condemnation for the Falcon Reservoir on the lower Rio Grande River.

The United States filed a Declaration of Taking in condemnation of these lands on January 3, 1950 cited as *United States v. 85, 237 Acres of Land, Zapata County, Tex., Flumencio Munoz, et al,* Civil Action No. 529 U.S. Dist. Ct., Southern Dist. - Laredo (Tab K, Record Excerpts, R.215,229).

The United States of America identified the six Share tracts in which Royalty Owners claim oil and gas royalties as follows:

Share 5A designated as U.S.A. Parcel No. Z-34AB
Share 28A designated as U.S.A. Parcel No. Z-27-A
Share 23 designated as U.S.A. Parcel No. Z-54.2A
Share 20 designated as U.S.A. Parcel No. Z-32-A1,A2 and B
Share 21 designated as U.S.A. Parcel No. Z-30-AB
Share 26 designated as U.S.A. Parcel No. Z-37-AB

After the entry of the Judgment on Declaration of Taking No. 1, dated January 23, 1950, via separate *Judgments on Stipulation-Exclusion* (See App. D at A-21 as one sample of the 6 similar judgments that were rendered) pertaining to each of the above described Parcels, the predecessors-in-interest were granted all right, title and interest to the oil and gas underlying the tract(s) subject to a negative drilling easement. These six separate judgments evidence the Plaintiffs' title to the subject lands.

The language of the condemnation documents and of the above described *Judgements on Stipulation-Exclusion* closely track the Government's intent to follow the express policy of the Secretary of State Acheson set out in his letter dated December 16, 1949. The Secretary directed that the owners would be permitted to retain their oil and gas rights subject to nondrilling easements. His letter states: "In conformity with the obligation imposed by the Treaty, it has been determined to acquire the estate in the lands as above mentioned. This will prevent the drilling for oil and gas within the area to be covered by the impounded waters and around the margin of the lake. *However, where directional drilling from locations above the 325-foot traverse will permit exploration and development of oil and gas from beneath the 325-foot contour,* (the parcels at issue in this case) *and exception will be made permitting the retention of the minerals by the present owners, should they desire to retain them, provided the area is of sufficient size to warrant a departure from the general rule.*" (emphasis supplied) (R.342). This policy is followed almost word for word in the Amended Petition in

Condemnation No. 3.

The policy of the United States not to acquire the oil and gas estates in the lands needed for the Falcon Reservoir is evidenced by (1) Secretary Acheson's letter to General McGrath; (2) the amended petition No. 3 of the United States in the condemnation proceeding alleging Secretary Acheson's policy that the owners would be permitted to retain their oil and gas estates, and (3) the final judgments in condemnation (*Judgements on Stipulation-Exclusion)* which decree the taking of the lands necessary for the public project, "save and except oil and gas", but subject to the imposition of perpetual non-drilling easements in lands lying below the 325-foot contour.

As the U.S. itself benefits from these royalty interests, the Royalty Owners filed suit against the U.S. under this Quiet Title Act, 28 U.S.C. Sec. 2409a and Sec. 1346(f).

At the District Court level, the United States offered no evidence to support its claim of title to the oil and gas fee estates. The oil and gas royalty owners' interests were carved out of these estates. Without evidence even to support its claim to the oil and gas fee estates, it likewise, presented no evidence to support its claim to the lesser-included royalty estates. The trial court judgment denying the Royalty Owners claims and the Appellate Court's opinion affirming same are in error and should be reversed.

REASONS FOR GRANTING THE WRIT

1. In affirming the holding of the District Court, the Fifth Circuit Court of Appeals has entered a decision in conflict with the decision of the United States Supreme Court on the same important matter.

The United States, having offered no other evidence, relies upon its Declaration of Taking and its Judgment on Declaration of Taking No. 1 (Tab L, Record Excerpts, R. 212) in support of its claim to these oil and gas royalty interests.

But that judgment evidences only the quick-taking by the United States of the subject lands as is authorized by 40 U.S.C. Sec. 258a. It is not a final judgment. *Catlin v. United States,* 324 U. S. 229, 65S. St. 631, 89 L. Ed. 911 (1944). In *Catlin,* the United States Supreme Court held that the judgment entered granting the United States title under the Declaration of Taking Act was interlocutory and not an appealable final judgment. The United States' Judgment on Declaration of Taking No. 1 is insufficient to support the Government's claim to Royalty Owners' oil and gas royalties because it is an interlocutory order. The final judgments, Judgment on Stipulation-Exclusion, (see App. D. as one sample of the 6 similar judgments) which followed, amend and supersede the only evidence of title to the oil and gas estates which the United States has. (Royalty Owners' Motion for Partial Summary Judgment, Tab F, Record Excerpts, Docket No. 34, R. 461).

The Declaration of Taking Act authorizes the Government to quick-take lands needed for public purposes. But the vesting of title permitted by the Act is subject to divestment. *Catlin, Supra.,* 324 U.S. 229, 240, 89 L.Ed. 911, 919-920; *Bishop v. United States,* 288 F2d 525, 527 (5th Cir. 1961). A quick-taking must be followed by the United States' filing of a Complaint, obtaining Service of Process upon the private owners, receiving Answers to the Complaint by the private owners and, after hearing or reaching agreements with the condemness, entry of final judgments confirming the takings. Fed. Rules Civ. Proc., Rule 71A, 28 U.S.C.A.; 40 U.S.C. Sec. 258a.

The complaint of the United States may properly be amended to revise the taking, as was done in this case. Fed. Rules Civ. Proc., Rule 71A; 40 U.S.C. Sec. 258a. The United States in its amended pleading elected not to take the oil and gas estates. This election necessarily included its election not to take the lesser-included severed perpetual oil and gas royalty interests.

The United States' intent not to take possession of the oil and gas estates is expressed in its Amended Petition in Condemnation No. 3. It alleges "that the owners of the oil and gas in and under said tracts [including the lands in which Royalty Owners claim to own oil and gas royalty interests] may, at their election, retain title to said oil and gas, subject to the terms of the negative easement prohibiting the drilling or deepening of any well for the purpose of producing oil and/or gas ...."(Docket No. 41, Tab I, Record Excerpts, R. 597). The evidence shows that the United States was never interested in possessing the oil and gas estates at Falcon. It was only interested in assuring that oil and gas operations not interfere with the intended use of the water storage resevoir. The United States invoked a method to permit the owners to retain their oil and gas rights subject to nondrilling easements.

The final judgments are unambiguous and uncontroverted evidence confirming the intent of the United States to not condemn an undivided 15/16ths of the subject oil and gas fee estates.

The Supreme Court in *Catlin,* supra., construes the Declaration of Taking Act, 40 U.S.C. Sec. 258a and Fed. Rules Civ. Proc., Rule 71A, Title 28, as provisional with respect to "vesting" of the United States with title by merely filing a Declaration of Taking and depositing with the court an estimated amount of cash representing its determination of value. The court said, "...we see no necessary inconsistency between the provisions for transferring of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding was brought." In affirming the District Court's holding, the Fifth

Circuit has entered a decision in conflict with *Catlin*, supra.

2. In Affirming the Holding of the District Court, the Fifth Circuit Court of Appeals Has Decided an Important Question of Federal Law That Should be Settled by this Court.

   a. The Taking by the United States of Severed Oil and Gas Royalties—Intangible Rights to Profits—is an Unconstitutional Deprivation of Property For a Nonpublic Purpose.

Royalty Owners have met their burden proving that the taking of their perpetual oil and gas royalty estates was done without public purpose by showing that these interests have no reasonable association with building or operating the United States' water storage reservoir.

An oil and gas royalty interest is only a right to a portion of the profit from the production and sale of oil and gas. *Sheffield v. Hogg,* 77 S.W. 2d 1021, 1024(Tex. 1934). Justice Hughes for the Supreme Court of the United States in *United States v. Noble,* 237 U.S. 74, 80; 35 S. Ct. 532; 59 L.Ed. 844, 848 (1915) defined a royalty interest as "a profit issuing out of the land." Professors William and Meyers in their treatise, *Oil and Gas Law;* Vol. 1, Sec. 301, "Royalty", page 42, describe a royalty as an incorporeal interest in land, "like unaccrued rent."

Being intangible, and oil and gas royalty cannot be lost by its true owner through adverse possession. It cannot be the object of a trespass—to—try title action. *Grasty v. Wood,*

230 S.W. 2d 568 (Tex. Civ. App.—Galveston, 1950, error ref'd. n.r.e.). Hon. Judge George P. Kazan in his Memorandum and Order agrees that an oil and gas royalty "is a nonpossessory right to profits". See App. C at A-8. An oil and gas royalty, being a "nonpossessory right to profits", as correctly defined by Judge Kazen, cannot be a property necessary or required to construct and operate a public water storage reservoir.

Justice Sandra Day O'Connor in *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 81 L.Ed. 2d 186, 200, 104 S. Ct. 2321, expresses well the rationale: "A purely private taking could not withstand the scrutiny of the public use requirement; *it would serve no legitimate purpose of government* and would thus be void." (emphasis added). Professor Phillip Nichols in Volume 1A, Sec. 4.7, "Due Process Requires a Taking For Public Use", page 4-38, of *Nichols On Eminent Domain,* emphasizes that a taking of property for a nonpublic use is unconstitutional: "A taking of property by eminent domain for a use which is not public is such a violation of the basic and essential features of constitutional government that it amounts to a taking without due process of law", citing *Fallbrook Irr. Dist. v. Bradley,* 164 U.S. 112, 41 L. Ed. 369, 17 S. Ct. 56 (1896) and other cases. Professor Nichols concludes without qualification, "The inhibition of the Fifth Amendment forbids the taking of provate property for private purposes." (Pages 4-40, 4-41, Vol 1A of the cited text). Citing *Brown v. United States,* 263 U.S. 78, 68 L.Ed. 171, 44 S. Ct. 92 (1923).

This United States Court of Appeals concurs. In *Abdul Muhammad Samaad v. City of Dallas,* 940 F2d 925, 936 (5th Cir. 1991) the court said, "a taking for a private purpose is unconstitutional even if the government provides just compensation." In the *City of Arlington, Tex. v. Golddust Twins*

Realty Corp., 41 F3d 960, 963 (5th Cir. 1994) this court said, "taking property for private use under the guise of public use violates due process and constitutes a legal fraud upon property owners even if there is no fraudulent intent." citing *Saunders v. Titus County Fresh Water Supply Dist.*, 847 S.W. 2d 424, 427 (Tex. App. — Texarkana 1993 no writ); *Whitfield v. Klein Ind. Sch. Dist.*, 463 S.W. 2d 232, 235 (Tex. Civ. App. — Houston [14th Dist.], writ ref'd. n.r.e.) Cert, denied, 404 U.S. 882, 92 S. Ct. 204, 30 L.Ed. 2d 163 (1971); and *City of Wichita Falls v. Thompson*, 431 S.W. 2d 909, 910 (Tex. Civ. App. — Ft. Worth 1968, writ ref'd. n.r.e.).

In *City of Arlington* the Fifth Circuit Court fully discusses the public use requirement. It recognizes that the issue is a judicial question (41 F3d 963). Golddust claimed that the condemnation of its land was for a private, rather than a public, purpose.

In the City of Arlington the Court recognized that public purpose was required and set forth the Texas definition of "public use". It says, "one of the tests for public use is whether the property taken is 'reasonably essential' to successful completion of a project." Here, because an oil and gas royalty has but a single use, that is, profit, there are no other possible alternative public uses. There is but the single forbidden private use, profit. (41 F3d 966).

This is the very test, the correct test, which the United States Court of Appeals for the Tenth Circuit applied in a condemnation by the United States of an oil and gas royalty along with the surface estate for the planned purpose of establishing a wildlife refuge. *Chandler v. United States*, 372 F2d 276 (10th Cir. 1967). The Chandler court recognized that the taking of an oil and gas royalty was unlawful because it "certainly has no possible connection with the harboring

and protecting of wildlife". (372 F2d 279). The court concluded: " ... such a taking was without legal authority and an abuse of discretion." (Emphasis added).

Here, as in *Chandler,* the severed oil and gas royalty interests claimed to have been taken by the United States, "certainly have no possible connection" with the establishment of a water storage reservoir. It is submitted, the holding in *Chandler* is directly on point, and supports Royalty Owners' claim that the taking of their oil and gas royalties was also done without legal authority and was an abuse of discretion.

b. The United States Exceeded its Authority in Condemning Private Property Without a Public Purpose.

The District Court recognized that the enabling statute authorized the United States to condemn property "which may be necessary". 22 U.S.C. Sec. 277c; District Court Memorandum and Order, (page 3, Tab B, Record Excerpts, R.621). If it is shown that private property is taken arbitrarily, capriciously or in bad faith, courts have the power to review the issue of necessity. *United States v. 2,606.84 Acres of Land, Tarrant County, Texas.* 432 F2d 1286, 1289 (5th Cir. 1970).

In Chandler, *supra,* the Tenth Circuit Court concluded as a matter of law that the taking of an oil and gas royalty, being only a nonpossessory interest in profit, "certainly has no possible connection" with creating a wildlife refuge. The court reasoned, therefore, that such taking was an abuse of discretion and was unlawful. The District Court here, after correctly defining and oil and gas royalty as a nonpossessory interest in profit, then inconsistently concluded that the

United States did not abuse its discretion by condemning Royalty Owners' oil and gas royalties.

The District Court concluded that the Royalty Owners' proof that their oil and gas royalties were unnecessary to the establishment of the public project was, nevertheless, insufficient to also show that the taking was arbitrary and capricious. (Page 3, Tab B, Record Excerpts, R. 620). If the taking of these oil and gas royalties was not necessary to the public project, as the District Court appears to agree, then the taking of them was without reason. And thus was arbitrary conduct.

c. The Trial Court Fashioned Without Supporting Evidence a Public Purpose For the United States To Take The Oil and Gas Royalties.

The trial court in its Memorandum and Order finds that the oil and gas royalties were lawfully condemned, because the United States' public purpose was to reduce cost. Without supporting evidence, the trial court sua sponte fashions as a cost—saving premise, that condemning the oil and gas royalties was done to avoid inverse condemnation suits which could have been brought against the United States by the royalty owners. It speculates that these owners "very likely" would have brought suits after the flooding of the lands over their royalty interests, claiming that submerging these lands devalued and possibly inversely condemned their oil and gas royalties.(page 8,2nd paragraph, Footnote 4, Tab B, Record Excerpts, R. 616). Thus, he says, the Government took the oil and gas royalties to remove the possibility of the costs necessary to defend such possible suits.

The District Court in its Memorandum and Order admits that "there is no evidence that such was the case".

(Page 8, 2nd paragraph, Footnote 4, Tab B, Record Excerpts R. 616). The Judge proceeds, however, to conclude without evidence that the avoidance of such suits was the Government's cost-saving public purpose for acquiring the Royalty Owner's properties. Royalty Owners argued below that such speculative and unsupported purpose, actually paranoiac, is baseless. An owner of surface executive-rights has no duty to royalty owners respecting the nature of the use of the surface. Professors H. Williams & C. Meyers, *Oil and Gas Law,* Vol. 2, Sec. 339.2, page 209-210; *Pickens v. Hope,* 764 S.W. 2d 256, 265 (Tex.Civ. App.-San Antonio, 1988, writ denied).

Williams & Meyers in the cited text negate any existing legal duty of an executive rights owner to a royalty owner: "He may exercise the executive right with the same self-interest in mind as if there were no outstanding royalty or nonexecutive mineral interest...if the conduct of the executive satisfies the ordinary, prudent landowner standard, the fact that the nonexecutive owner has been harmed is nonactionable under this view. The District Court rejects this black-letter law response of the Royalty Owners, saying that it was unpersuasive. (Tab B, p. 8, Footnote 4, 3rd paragraph, R.616). He concluded that even if the Royalty Owners were correct and there is no recoverable claim by a royalty owner against the executive rights owner for surface use, "Plaintiffs most assuredly would have sued to determine precisely whether the condemnor's action constituted a breach." (Tab B, p. 8, Footnote 4, R.616).

Would the United States not better and more rationally have effected economy in their project by simply following the law, that oil and gas royalties, being nonpossessory interests in profit, are not necessary for a water storage reservoir; and that flooding lands over them is entirely permissible and is nonactionable by royalty owners? Where is the

saving suggested by the District Court which he says compelled the United States to condemn these oil and gas royalties? The District Court, as a basis for its conclusion that the oil and gas royalties were condemned by the Government to save cost, construes Secretary Acheson's letter oppositely in meaning than do the Royalty Owners.

Secretary Acheson's letter simply does not express as a purpose of the condemnation the reduction of costs. As Royalty Owners' evidence shows, the Petition of the United States was amended. The oil and gas estates were excepted. The final judgments decree that the lands necessary to provide for the reservoir were condemned, "save and except oil and gas."

The "condemnation" by the United States was not simply its Declaration of Taking, and the preliminary Judgment on Declaration of Taking No. 1. *Catlin v. United States, supra.* The "condemnation" also includes the Government's amended Complaint and the final judgments which do not decree the taking of the oil and gas estates, and more pointedly, they do not decree the taking of the oil and gas royalty estates.

Judge Kazen disjoins the condemnation proceeding as though it was not a continuous single adjudication. He says, "The United States condemned the royalty interests in 1950, then revested 15/16ths of the royalty [actually, 15/16ths of the oil and gas fee estate] interest pursuant to revestiture stipulations in judgments entered between 1955 and 1958." (Tab B, Record Excerpts, p. 9, 2nd paragraph, R.615). He reasons that the Government changed its position between 1950 and the dates of the respective judgments — that it needed the oil and gas estates in 1950; but decided after 1955 that they were not required.

The period during which the single condemnation proceeding occurred, ending with the final judgments entered,

evidences no change of position by the United States. It simply took that long for the Government to finally complete its task. It is unexplained by the District Court how taking these estates in 1950, and revesting an undivided 15/16ths of them after 1955, all in the same condemnation proceeding, operated to accomplish costs savings. Nor is there in the record any evidence supporting such conclusion.

It is these important questions of federal law - the definition of public purpose, the extent of government authority, and the lack of supporting evidence that should be decided by this Court.

CONCLUSION

The final judgments in condemnation expressly exclude from the taking, "oil and gas" (See App. D) and thus the Royalty Owners' royalty interests. The United States has no basis for its claim of title. It relies upon the Judgment on Declaration No. 1, which is an interlocutory unappealable order superseded by the final judgments. It is insufficient to support its claim. The Royalty Owners' oil and gas royalty interests are vested in them as a matter of law.

The condemnation of these severed perpetual oil and gas royalties was unconstitutional. The taking of them had no relationship to the establishment or operation of the water storage reservoir. The United States Court of Appeals, Tenth Circuit, correctly decided in *Chandler, supra.*, that the taking of an oil and gas royalty "was without legal authority and an abuse of discretion". (372 F2d 279). Because an oil and gas royalty is only a "nonpossessory right to profits", as Hon. Judge Kazen in his Memorandum and Order correctly concludes (Tab B, Record Excerpts, p. 3, 1st paragraph, R.621), such interests can have no reasonable association with establishing the Falcon Water Storage Reservoir.

The District Court's conclusion that, nevertheless, the oil and gas royalty interests were necessary to the public purpose in order to reduce Government expense is unsupported by any evidence. It is entirely speculative. It is not shown that the Secretary initiated the condemnation for the purpose of economy. Judge Kazen admits that there is no evidence to support his conclusion that the royalty interests were taken for the purpose of avoiding the cost to the United States of defending possible lawsuits by the royalty owners claiming that the creation of the take inversely condemned their interests (Tab B, Record Excerpts, p. 8, 2nd paragraph, Footnote 4, R.616). Yet he concludes and finds that the avoidance of such suits, even if they may be groundless, was a valid reason for the United States to acquire the Royalty Owners' oil and gas royalties.

The establishment and continuing existence of the water storage reservoir is not possibly constructive notice to Royalty Owners that the titles to their oil and gas royalties have been challenged. Such owners' titles cannot be lost by adverse possession. These royalty interests are unpossessable. Because the United States' own judgments in condemnation expressly except from the takings, the "oil and gas", its claim to Royalty Owners' oil and gas royalties is without basis. Royalty Owners ask the court to reverse the judgments of the Appellate and District Courts and render judgment quieting the titles of Royalty Owners in their oil and gas royalties.

Dated July 15, 1998.

Respectfully submitted,

Neil Norquest
4900 North 10th, Bldg. A-1
McAllen, Texas 78504
Telephone: (956) 682-3195

APPENDIX A

IN THE UNTED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-40808

FILED
APR 16 1998

SYLVIA D. RECKLIESS; ET AL

Plaintiffs

SYLVIA D. RECKLIESS; KAREN G. MANDELBAUM; LYN C. MANDELBAUM; ELIZABETH M. BAKER; MARY L. LOVE;

Plaintiffs - Appellants

KIRK BAKER; HEIRS OF F. P. COOPER; HEIRS OF L. L. PRICE; HEIRS OF LILLIAN B. CARTER; HEIRS OF A. M. FURY; HEIRS OF J. A. LEWIS; HEIRS OF H. S. PAYNE; HEIRS OF CHARLES J. OLSON; HEIRS OF A. ABRAHAM; HEIRS OF GEORGE R. HRIVNAK; HEIRS OF L. M. MARKCOM; JAMES B. NICKELL; HEIRS OF HARRY B. OGG; HEIRS OF A. C. MCGILTON; HEIRS OF A. J. KNUTSON; HEIRS OF EDWARD BRODIN; HEIRS OF RICHARD HATCH; HEIRS OF IRA M. HENDERSON; HEIRS OF H. L. FOUTCH; HEIRS OF JOHN C. KNOX; HEIRS OF GEORGE A. CURRY; MARY LOVE, Trustee of the Love Family Trust.

Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Laredo

ON PETITION FOR REHEARING

Before DUHE, DeMOSS, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied.

ENTERED FOR THE COURT:

/s/ JAMES L DENNIS
JAMES L DENNIS
United States Circuit Judge

CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

REHG-2

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-40808
Summary Calendar

FILED
FEB 23 1998

SYLVIA D. RECKLIESS, ET AL.,

Plaintiffs,

SYLVIA D. RECKLIESS; KAREN G. MANDELBAUM; LYN C. MANDELBAUM; ELIZABETH M. BAKER; MARY L. LOVE;

Plaintiffs-Appellants,

KIRK BAKER, ET AL.,

Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

. . . . . .

Appeal from the United States District Court
for the Southern District of Texas
USDC No. LO-94-CV-180

. . . . . .

Before DUHE, DeMOSS, and DENNIS, Circuit Judges.

PER CURIIAM:*

Sylvia D. Reckliess and other appellants appeal the district court's grant of summary judgment to the United States. The appellants argue that the district court erred in finding that the oil and gas royalties at issue were taken upon the filing of the Declaration of Taking in Civil Action No. 529 in January 1950, and that title vested in the Government as of that date. Appellants also argue that the district court erred in finding that the Government's taking of the royalties did not violate the Fifth Amendment, and erred in finding that the determination of the necessity or lack thereof for that taking was non-justiciable.

While the parties and the district court have labeled the decision appealed from a summary judgment, the scope of this court's review is not necessarily determined by that label. *Fritiofson v. Alexander,* 772 F.2d 1225, 1239 (1985). Although appellants assert that the essential facts are not in dispute, the parties disagreed about a number of material questions. Nevertheless, they agreed to pretermit without waiving consideration of the issues of notice and staleness, and manifested an intent to submit the remaining questions (whether the royalties at issue were in fact taken by the Government, and whether that taking was lawful), to the district court for resolution on the existing record. *See Fritiofson,* 772 F.2d at 1239. As the district court in reality decided questions of fact, and as the parties effectively agreed to that procedure, we have reviewed the decision as a trial on a stipulated record, reviewing questions of law de novo and

* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

questions of fact for clear error. *See Fritiofson*, 772 F.2d at 1239-40; *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Accordingly, as we have reviewed the record and the district court's opinion and find no error, we AFFIRM for essentially the reasons given by the district court. *Reckliess v. United States*, L-94-CV-180 (S.D. Tex. March 31, 1997).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

FILED
MAR 31, 1997

SYLVIA D. RECKLIESS, ET AL,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	Civil Action
	*	No. L-94-180
UNITED STATES OF AMERICA,	*	
	*	
Defendant	*	

MEMORANDUM AND ORDER

Pending before the Court is *Plaintiffs' Motion for Partial Summary Judgment* (Docket No. 31), filed August 21, 1995. Plaintiff's filed this action under the Quiet Title Act, 28 U.S.C. §2409a, to quiet title in oil and gas royalties attached to land claimed by the United States.

Plaintiffs claim to be successors-in-interest to a 1/16th oil and gas royalty interest in certain parcels of real property located in Zapata County, Texas. Under authority granted in 22 U.S.C. §277b and c, the United States

condemned the Zapata County parcels in Civil Action No. 529 in this Court in order to build the Falcon Dam and Reservoir. Following the filing of a petition in condemnation in December 1949, the United States filed *Declaration of Taking No. 1* in January 1950, and paid $252,800 into the registry of the Court. In January 1950 the court entered *Judgment on Declaration of Taking No. 1* in Civil Action No. 529. That judgment decreed title to the entire mineral estate in the condemned lands, including the nonpossessory royalty interest at issue here, to be in the United States, pursuant to 40 U.S.C. §258a. Plaintiffs have filed this action to void the 1950 condemnation as violative of their Fifth Amendment Due Process rights on two grounds: that the condemnation of the disputed royalty interest violated the constitution because the taking was for a private purpose and that it exceeded the Government's statutory authority because it was unnecessary.

At a pretrial hearing on August 7, 1995, the parties agreed — in view of the extended time needed for discovery — to pretermit, without waiving, the issues of the validity under Fed. R. Civ.P. 71A of notice to the landowners during the condemnation proceedings, and the effect of the Quiet Title Act's twelve-year statute of limitations, 28 U.S.C.§2409(a)g. *See Defendant's Response to Motion for Partial Summary Judgment* (Docket No. 37), filed September 14, 1995. Accordingly, the Court proceeds directly to the merits of Plaintiffs' claims challenging the statutory basis for the United States' right to take.

"Private Taking"

Plaintiffs argue that their oil and gas royalties "have

no other property attribute than possible yield of profit from oil and gas if produced and sold from the subject lands" and, therefore, the condemnation of the Plaintiffs' royalty interests amounted to a private taking in violation of the Constitution. Docket No. 31 at 2. The Fifth Amendment to the Constitution prohibits the federal government from exercising its power of eminent domain for other than a "public use." *Hawaii Housing Authority v Midkiff,* 104 S.Ct. 2321, 2328-30 (1984). So constrained, the federal government may not take "one person's property. . .for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consolidated Gas Utilities Corp.,* 57 S.Ct. 364, 376 (1937). *Hawaii Housing,* 104 S.Ct. at 2331. Thus, a "private taking" is, by definition, a taking for the benefit of a private person.

While it is not disputed that Plaintiffs' purported interest is a nonpossessory right to profits, that alone does not render the condemnation of that interest a "private taking." A taking is not "private" merely because the interest taken is of a sort in which private persons, and not the federal government, are or ought to be engaged. It is the end for which the interest is taken, and not the nature of the interest, that implicates the Public Use Clause of the Fifth Amendment. *See Hawaii Housing,* 104 S.Ct. at 2331. There is no evidence, and Plaintiffs do not assert, that the royalty interest taken in Civil Action No. 529 is now being enjoyed by another private person. Therefore, the Court holds that the taking did not violate the Public Use Clause of the Fifth Amendment.

"*Not Necessory*

Plaintiff's argue that the condemnation of "private

property in the nature only of intangible future profits from the sale of oil or gas which might possibly be produced from the lands to which they are ascribed. . .was unassociated with and incapable of contribution to the establishment" of the Falcon Dam and Reservoir. Docket No. 31 at 2. Title 22 U.S.C. §277c authorizes the Secretary of State to acquire by exercise of eminent domain "any real or personal property which may be *necessary*" to facilitate projects in compliance with the provisions of Title 22 and the provisions of treaties between the United States and Mexico. (Emphasis added). The construction of the Falcon Dam and Reservoir was such a project. Plaintiffs argue that, because the United States could have completed the project without having acquired a royalty interest in any oil and gas produced from the condemned land, condemning more than the surface rights was not "necessary" to the construction of the Falcon Dam and Reservoir. Therefore, the taking of their royalty interests allegedly exceeded the United States' statutory authority under 22 U.S.C. §277c.[1]

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[1] Defendant argues that under 40 U.S.C. §257 an official of the United States who is authorized to procure real estate for public use may condemn such real estate whenever in the official's opinion it is "necessary or *advantageous* to the Government" to do so, and that condemning the royalty interests in Civil Action No. 529 was advantageous to the Government. (Emphasis added). *Defendant's Motion to Dismiss Second Amended Complaint or, in the Alternative for Summary Judgment* (Docket No. 36) at 2. Although the United States had invoked authority to condemn under, *inter alia*, 40 U.S.C. §257 in its *Petition in Condemnation* (Civil Action No. 529, at 1), the United States actually accomplished the condemnation in Civil Action No. 529 pursuant to the declaration of Taking Act, 40 U.S.C. §258a. *See Declaration of Taking No. 1*, Civil Action No. 529, at 1; *see also Judgment on Declaration of Taking No. 1*, Civil Action No. 529, at 1-2, 27. Defendant also acknowledges that each revestment stipulation in Civil Action No. 529 indicates that the United States acquired title pursuant to the Declaration of Taking Act. *See United States Reply Brief in Support of Moton to Dismiss Second Amended Complaint*

Even assuming, however, that the United States was authorized to condemn only those lands that were "necessary" to the construction of the Falcon Dam and Reservoir, any dispute over whether the taken interest was a necessary one is a nonjusticiable issue."It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project." *United States v. 2,606.84 Acres in Tarrant County, Texas,* 432 F.2d 1286, 1289 (5th Cir. 1970). 2,606.84 Acres, like Civil Action No. 529, involved a taking pursuant to the Declaration of Taking Act, 40 U.S.C. §258a. According to the Supreme Court in *Berman v. Parker,* 75 S.Ct. 98 (1954), a challenge to a condemnation under the District of Columbia Redevelopment Act of 1951, 60 Stat. 790:

> It is not for the courts to oversee the choice of the boundary line nor sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and *character* of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

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footnote 1 continued

(Docket No. 38), filed September 14, 1995, at 5.

The two statutes prescribe discrete methods of condemnation. In a "straight condemnation" under §257, the United States files a complaint in condemnation and the matter is adjudicated. Under §258a, title automatically vests in the United States upon the filing of a declaration of taking and depositing the estimated amount of just compensation with the court. *United States v. 2,175.86 Acres of Land, etc.,* 696 F.2d 351, 353 (5th Cir. 1983). Unlike §257, §258a does not provide for condemnation when "advantageous" to the Government, but instead authorizes condemnation in the manner described above in cases where an official of the United States has been empowered to acquire land for public use. Thus, the "necessary" requirement imposed by 22 U.S.C. §277c, to the extent it controls, was not relaxed in Civil Action No. 529 by any provision of 40 U.S.C. §257.

Berman, 75 S.Ct. at 99 (emphasis added). The *2.606.84 Acres* court echoed its own holding in *West Inc. v. United States*, 374 F.2d 218, 222 (5th Cir. 1967):

> Provided that land can be reasonably related to a public purpose, the United States, in eminent domain proceedings, is not limited to taking in fee the amount of property which will be physically occupied by the public or actually submerged in a flood control operation. . . .[T]he purpose intended being valid, the necessity of the taking and the *character* of the title to be taken are decisions vested exclusively in the Secretary.

(Emphasis added).[2] The clear rule is that this court cannot review an Executive Branch decision to determine which land in particular, and which character of its title, is actually "necessary" to effect a legislative mandate.

The one exception to the rule of nonjusticiability occurs when the purportedly necessary taking represents an arbitrary and capricious exercise of the power of eminent domain. *2,606.84 Acres*, 432 F.2d at 1290. An official authorized to condemn land has acted arbitrarily and capriciously when he has "so overstepped his authority that no reasonable man could conclude that the land sought to be condemned had some association with the authorized project." *Id.* Plaintiffs cannot, as they claim (*see Plaintiffs' Response to Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint*

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[2] Title 33 U.S.C. §§ 591 authorized the condemnation at issue to *West*. Although the opinion does not indicate explicitly that the condemnation was accomplished pursuant to the Declaration of Taking Act, the Government did file a declaration of taking.

(Docket No. 35, filed August 29, 1995, at 2), merely show the taking was unnecessary. They also must show it to have been arbitrary and capricious. This requires that the Court find "pervasive deception, unreasoned decision, or will-of-the-wisp determination basic to" the Falcon Dam and Reservoir project. 432 F.2d at 1290. As noted, *supra*, a taking need merely be "reasonably related" to the public purpose to avoid judicial review West, 374 F.2d at 222, *2,606.84 Acres,* 432 F.2d at 1289. *See also Hawaii Housing,* 104 S.Ct. at 2329-30.

Plaintiffs point to correspondence between federal officials involved in the condemnation as evidence that the United States "pre-determined and publicly announced that it would not require the oil and gas estates in the lands needed for the Falcon Reservoir." *Plaintiff's Response to Reply Brief of United States in Support of Its Motion to Dismiss Second Amended Complaint* (Docket No. 39), filed September 19, 1995, at 2. The taking of Plaintiffs' royalty interest in spite of that determination was, Plaintiffs argue, arbitrary and capricious. *Id.* at 11.

Among the correspondence is a pre-condemnation letter dated December 16, 1949, from the U.S. Secretary of State, Dean Acheson, to the U.S. Attorney General, J. Howard McGrath ("the "Acheson letter"). *See* attachment to *Plaintiff Response to Defendant's Motion to Dismiss* (Docket No. 17), filed June 15, 1995, and attachment to *United States Rely Brief in Support of Motion to Dismiss Second Amended Complaint)* (Docket No. 38), filed September 14, 1995. Plaintiffs argue that the Secretary of State's reference to "retention of the minerals by the present owners" indicates that the Government's actual intent was never to take the mineral rights Docket No. 39 at 6. Defendant argues that this letter is evidence that the taking in fee simple reduced the overall

cost of the condemnation by avoiding complicated title litigation and allowing the United States to revest mineral interests in their former owners thereafter. *Defendant's Motion to Dismiss Second Amended Complaint or, in the Alternative, for Summaray Judgment* (Docket No. 36) at 6-7; Docket No. 38 at 3. The relevant portions read as follows:

> The state of the titles to the lands in Zapata County is such that it is impossible to acquire them by direct purchase except in very few cases. The diversity of ownership will be immediately apparent by reference to the purported ownership as disclosed in the attached declaration of "Taking No. 1. To attempt to separate the lands which might be acquired by direct purchase from those which it will be necessary to acquire by condemnation would, it is believed, result in confusion. *The acquisition of title and payment of compensation to the owners will be more speedily effected by the filing of the Declaration of Taking. . . .All the lands described [in the Declaration of Taking] are necessary to provide for the reservoir when the dam is completed.*
>
> * * *
>
> *Title to the lands within Tract A. . .is to be acquired in fee simple,* subject to existing easements for public utilities and public highways. . . .In Tracts B, C, D, E and F the estate to be acquired is the fee simple title, save and except oil and gas, provided that the development and production of oil and gas shall be subject to such reasonable regulations to prevent contamination or pollution of the Falcon Reservoir as may be prescribed by the United States Commissioner, International Boundary and Water Commission, United States and

> Mexico, and subject to existing easements for public utilities and public highways. . . .
>
> In conformity with the obligations imposed by the Treaty, *it has been determined to acquire the estate in the lands as above mentioned.* This will prevent the drilling of oil and gas within the area covered by the impounded waters and around the margin or the lake. However, *where directional drilling from locations above the 325-foot traverse will permit exploration and development of oil and gas from beneath the 325-foot contour, an exception will be made permitting the retention of the minerals by the present owners, shoud they desire to retain them,* provided the area is of sufficient size to warrant departure from the general rule.
>
> In order to make known this policy, the United States Commissioner recently mailed to the principal owners of oil and gas interests in Zapata County a statement to that effect. . . *The Petition is silent as to the policy, since at the present time the United States Commissioner is unable to determine the areas, if any, which will be sought to be exempted. It is believed that as these become known, amendments to the Petition may be filed and, in the case of the lands covered by Declaration of Taking No. 1, title may be revested if warranted.* In subsequent declarations where the exception is desired, the declaration will so provide.

(Emphasis added). The clear import of the Acheson letter is that the condemnation in fee simple, including royalty interests, would "speedily effect" payment of compensation.

Clearly cost was an issue.[3] The letter indicates that the United States was unable at the time of the condemnation to determine which property rights would be exempted from the condemnation, and that the Government would file amendments to the Petition as necessary and revest title "if warranted," which ultimately is what happened. Such an approach does not involve "pervasive deception, unreasoned decision, or will-of-the-wisp determination."[4]

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[3] Reducing cost is a valid rationale for exercising the power of eminent domain. In *United States ex rel. Tennessee Valley Authority v Welch*, 66 S.Ct. 715 (1946), the Supreme Court held that the TVA could condemn an entire mountain town that would be left inaccessible by creation of a dam where such condemnation would be less expensive than constructing a new access road for the town. The court ruled that

> the fact that the [TVA] wanted to prevent a waste of government funds. . . [did not detract] from its power to condemn. . . . The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost. . . .[W]hen serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public.

Id. at 719. The United States' decision to condemn the entire fee simple estate in Civil Action No. 529, and then revest mineral rights as warranted, was not an arbitrary and capricious act but a common sense adjustment to the serious problem of determining which areas would be exempted.

[4] Defendant has focused its argument on the rationale that the taking of the oil and gas interests was necessary to prevent and control mineral development that might contaminate the reservoir. Plaintiffs argue that the disputed 1/16th royalty interest has no executory rights and therefore was unnecessary to any effort to control drilling — that is, the United States could have taken all the mineral rights except the royalty interests and still prevented drilling because the royalty holders have no power to produce oil and gas, only the right to profit therefrom.

Although there is no evidence that such was the case, Defendant

Plaintiffs insist that the United States did not need or desire the oil and gas in the land under the reservoir.[5] Defendant, however, does not argue that taking the royalties was necessary to the Falcon Dam and Reservoir project in the sense that project could not otherwise have been built. Rather, Defendant argues that the royalties were necessary in the sense that not taking them would have made the

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footnote 4 continued

argues and it is reasonable to conclude that by condemning in fee simple in Civil Action No. 529, including oil and gas, the United States avoided inverse condemnation lawsuits by the oil and gas royalty owners. If the United States had acted as Plaintiffs recommend, and controlled oil and gas production by condemning the oil and gas estates, excepting royalty interests, the owners of the royalty interests would very likely have sued for compensation on the ground that the taking deprived them of the value of their interest because the United States — as Plainfiffs so vehemently argue here — had no interest in the oil and gas under the reservoir.

Plaintiffs respond that they could not have sued under such a scenario because the condemnor, as holder of the surface rights, would not have breached its duty of good faith and fair dealing merely by submerging the land under a reservoir and restricting oil and gas development. Docket No. 35 at 11-13. But even if Plaintiffs' statement of the law is correct, the argument begs the question — Plaintiffs most assuredly would have sued to determine precisely whether the condemnor's action constituted a breach. For Plaintiffs to argue now that fifty years ago they would not have sued because they would have anticipated and conceded their adversary's defense is unpersuasive.

Thus, condemning the oil and gas estate in full, even for the limited purpose of controlling mineral development, would have the additional effect of reducing the cost and increasing the efficiency of the taking, which the Court here finds would mean that the condemnation was not arbitrary and capricious.

[5] Plaintiffs claim that the United States' "policy and pleadings" in Civil Action No. 529 "merely offer that it was willing to acquire the oil and gas estate of any owner who desired to relinquish it in consideration for payment." This claim misunderstands the mechanics of a condemnation action. *Plaintiffs' Offer of the Government's Amended Petition in Condemnation No. 3...* (Docket No. 41), filed December 15, 1995.

entire condemnation more complicated and costly. The United States chose instead to condemn everything, and then revest in the original owners the mineral rights as such could be determined.

Plaintiffs attempt unsuccessfully to challenge on several grounds Defendant's claim that the condemnation in fee simple reduced the cost of the condemnation. Plaintiffs first assert that the judgments on the revestiture stipulatioans[6] "appear to leave vested in the original condemness all of the oil and gas estate. . .Either the United States never took, or it immediately after taking revested to the original owners, at least an undivided fifteen sixteenths interest in the oil and gas estates." Docket No. 35 at 9. Such statements contradict the record of Civil Action No. 529. The United States condemned the royalty interests in 1950, then revested 15/16ths of the oil and gas fee estates royalty interest pursuant to revestiture stipulations in judgments entered between 1955 and 1958. Despite Plaintiffs' claim to the contrary, the United States did not admit in each revestiture stipulation "that it *never* needed the oil and gas estate." *Id.* at 6-7 (emphasis added). The stipulations reflect that the United States would revest the oil and gas estate because only the remainder was *now* required" — referring to the time of the stipulation. *Id.* at exhibits 8-13, (emphasis added). Plaintiffs assert without explanation that evidence showing that the United States failed to revest Plaintiffs' royalty interest because the United States failed to locate the owner "dispels the Government's argument that Plaintiffs' royalties were condemned for the purpose of limiting possible liability." Docket No. 35 at 11. Plaintiffs argue further that Defendant's "obviously controlling purpose in

[6] *See* Exhibits 1-7, *Brief in Support of Plaintiffs' Motion for Summary Judgment (Docket No. 32, filed August 21, 1995.*

claiming Plaintiffs' royalties is to have the yield of profit they can provide." *Id.* Nonetheless, neither Defendant's rationale for failing to revest nor its desire to profit now have anything to do with the statutory validity of the 1950 condemnation.

Plaintiffs rely on *Chandler v United States,* 372 F.2d 276 (10th Cir. 1967), in which the United States filed a declaration of taking which condemned land for the creation of a national wildlife refuge in Kansas. Pursuant to the declaration, the United States took the land in fee simple, reserving mineral rights in the owners and third parties for fifteen years, and also took a percentage of royalties from the production of oil and gas during that period. The Court of Appeals affirmed a district court ruling[7] that the condemnation of the royalty interest was without legal authority and an abuse of discretion because it had "no possible connection with the harboring and protecting of wildlife." *Id.* at 279. Although at first glance the case appears analogous to Civil Action No. 529, the taking of the royalty interest separate from the remainder of the oil and gas rights in *Chandler* suggests a Government effort, obviously in anticipation of mineral production on the condemned land, to profit gratuitously from the mineral exploitation of land in which the Government wanted only the surface rights. In

[7] In *Chandler,* the district court granted the United States leave to file an Amended Declaration of Taking, which eliminated the royalty interest, after another court in the District of Kansas, in a condemnation case involving the same wildlife refuge, held the reserved royalty interest to be illegal. It is the grant of leave grounded on the ruling in the district court's sister court that the Court of Appeals affirmed in *Chandler.* 372 F.2d at 279. Presumably, the landowners challenged the grant of leave because the value of the interest taken, and the compensation therefor would necessarily be reduced by the terms of the Amended Declaration.

Civil Action No. 529, however, the Government took in fee simple for the construction of a dam and reservoir, including all the oil and gas rights, and then made revestiture of mineral rights available to all former owners. These facts lack the profiteering suggested in *Chandler.*

Because the Acheson letter establishes that the condemnation of the disputed royalty interest was more than "reasonably related" to the Falcon Dam and Reservoir project, the Court cncludes that, as a matter of law, Plaintiffs cannot carry their burden to show that "no reasonable man could conclude that the land sought to be condemned had some association with the authorized project." Plaintiffs have provided no basis for the Court to find that the Falcon Dam and Reservoir condemnation violated their right to Due Process under the Fifth Amendment to the Constitution. Accordingly, *Plaintiffs' Motion for Partial Summary Judgment* (Docket No. 31) is hereby DENIED.

Defendant has responded to Plaintiffs' summary judgment motion with *Defendant's Motion to Dismiss Second Amended Complaint or, in the Alternative, for Summary Judgment* (Docket No. 36). Because the issues presented are the same as those discussed in this memorandum, that motion is hereby GRANTED.

Accordingly, the following motions are hereby DENIED as moot:

(1) *Plaintiff's*[sic] *Motion for Judgment* (Docket No. 5), filed February 22, 1995.

(2) Defendant's *Motin to Dismiss for Lack of Jurisdiction* (Docket No. 14), filed June 8, 1995.

(3) Defendant's *Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Summary Judgment* (Docket No. 15), filed June 13, 1995.

DONE at Laredo, Texas, this *31st* day of March, 1997.

/s/ George P. Kazen

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed 27 day of September 1986
v. Bailey Thomas, Clerk
By_____/s/_____Deputy

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION,
	§	NO. 529
85,237 ACRES OF LAND, MORE	§	
OR LESS, IN ZAPATA COUNTY,	§	PARCEL NO.
STATE OF TEXAS, FLUMEN-	§	Z-34-AB
CIO MUNOZ, ET AL.,	§	
Defendants	§	DECLARATION
	§	OF TAKING
	§	NO. 1

****

JUDGMENT ON STIPULATION - EXCLUSION

On this day came on to be considered, upon the stipulation of the parties, this cause insofar as same relates to Parcel No. Z-34-AB, more particularly described in the Declarations of Taking hereinafter mentioned, and

It appearing that by Petition in Condemnation and

Amendments thereto, Plaintiff sought to condemn the estate hereinafter defined in Parcel No. Z-34-AB; that on the 3rd day of January, 1950, Declaration of Taking No. 1 was filed and the sum of $15,181.00 was deposited as estimated compensation for Parcel No. Z-34-AB, said amounts being deposited for the use of the persons entitled thereto at the time of the filing of said Declarations of Taking, and

It further appearing to the Court that upon the filing of Declaration of Taking No. 1 and the deposit of estimated compensation there became vested in the United States of America the fee simple title to Parcel No. Z-34-AB, save and except the oil and gas underlying Parcel No. Z-34-B but subject to the right of this Plaintiff to regulate drilling and subject to existing easements for public utilities and public highways, and

It appearing that the Court has confirmed the report of the Special Master and has adjudicated that Genaro Guerra, a bachelor, Paula Guerra de Arriaga, a feme sole, Rafael Guerra and wife, Ana Saenz de Guerra, Federico Guerra, a bachelor, and Maria Feliz Guerra, a feme sole, Defendants herein who signed the Stipulation, were at the time of the filing of the Declarations of Taking the owners in fee simple of Parcel No. Z-34-AB, and are the persons entitled to the just compensation; and

It appearing to the Court that the parties hereto have agreed upon the exclusion from the above proceeding of certain land and interest in land hereinafter described and defined and upon the revesting of the title to such land or the interest in such land in the former owners, and

It appearing to the Court that the parties hereto agreed

that the just compensation to be paid for the taking of that portion of Parcel No. Z-34-AB remaining in the proceeding including all buildings and improvements thereon and all appurtenances thereto belonging is the sum of $7,250.00, inclusive of interest, which amount is also in full settlement of any and all claims for damage arising out of the original condemnation, taking, and use by Plaintiff of the land and interest in land excluded.

It is accordingly ORDERED, ADJUDGED AND DECREED:

1. That there is excluded from the above proceeding and revested in the former owners all right, title and interest acquired and taken by Plaintiff in that portion of Parcel No. Z-34-AB designated as Sub-Parcels Nos. 34.1-F and 34.2-F which Sub-Parcels are more particularly described in the plat of said parcels recorded in the Map Records of Zapata County, Texas, in Volume 3, Page 1, except a perpetual easement to flood intermittently said land and to burden the same with every direct effect of such flooding, to the extent only that such intermittent flooding is occasioned by actual operation of the Falcon Dam and Reservoir, as now constructed, including the right also of ingress, egress and regress for the purpose of operation and maintenance of said Falcon Dam and Reservoir project, and there are also excluded from the above proceeding and revested in the former owner or owners all right, title and interest acquired by Plaintiff in that portion of parcel No. Z-34-AB designated in the plat above mentioned as Sub-Parcel No. 34-R; the oil and gas underlying Sub-Parcels 34.1, 34.2 and 34.3, subject to the negative easement defined below and all interest in Parcel No. Z-34-AB lying within Parcels Z-H-1, Z-H-1A and Z-H-1-T-1, except the highway and telephone easements defined below.

2. That there is condemned by and vested in the United States of America the fee simple title to that portion of Parcel No. Z-34-AB designated as Sub-Parcels Nos. 34.1, 34.2 and 34.3, which Sub-Parcels are also more particularly described in said plat, save and except oil and gas but including the negative easement, in the United States of America, to prohibit the drilling or deepening of any well for the purpose of producing oil and/or gas, provided, however, that exploration for and development of oil and/or gas under said land will be permitted by directional drilling from locations free from this easement and subject also to existing easements for public utilities and public highways; and there is also condemned by and vested in the United States of America the flowage easement above defined in Sub-Parcels No. 34, 1-F and 34.2-F, and the following highway and telephone easements: (*legal description of easements omitted*)

That the amount of $7,250.00, inclusive of interest, is just compensation for the taking of that portion of Parcel No. Z-34-AB remaining in the proceeding, including Parcels Z-H-1, Z-H-1A and Z-H-1-T-1 lying therein, which amount is also in full settlement of any and all claims for damage arising out of the original condemnation, taking, and use by the Plaintiff of the land and interest in land hereby excluded.

3. That the Clerk of this Court shall pay to the order of Genaro Guerra, Paula Guerra de Arriaga, Rafael Guerra and wife, Ana Saenz de Guerra, Federico Guerra, and Maria Feliz Guerra the sum of $525.00, in full satisfaction of and just compensation for the taking of the United States of America of the parcel or portion of parcels aforesaid which amount shall be charged to the fund deposited into the Registry of the Court for Parcel No. Z-34-AB, the amount of $6,725.00 having previously been advanced to said

Defendants; and the Clerk is directed to pay the sum of $7,931.00 out of the fund deposited for Parcel No. Z-34-AB to the Treasurer of the United States of America as a refund of the excess money remaining in the Registry of the Court.

It is further ORDERED, ADJUDGED and DECREED that this cause shall be closed in the docket of this Court insofar as it relates to Parcel No. Z-34-AB.

ENTERED at Laredo, Texas, this the 25th day of September, 1956.

/s/

UNITED STATES DISTRICT JUDGE

APPROVED:

/s/

ASSISTANT UNITED STATES ATTORNEY